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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 578.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF LESTER FIELD, Deceased, BARNETT HOLLANDER, Temporary Administrator and Executor.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF *AMICUS CURIAE.*

CHARLES ANGULO,
Amicus Curiae.

THE COURT PRESS, N. Y. C.

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BRIEF *AMICUS CURIAE.*

Statement.

We are submitting this *amicus* brief (with the consent of counsel herein) in behalf of the estate of John C. Duncan, deceased, which is the petitioner in a proceeding now pending in The Tax Court of the United States involving the same basic question as that presented in the case at bar.

The facts in the *Duncan* case are briefly these: On January 23, 1924, the decedent created an irrevocable *inter vivos* trust the provisions of which may be summarized as follows: The duration of the trust, or the trust term, was measured by the lives of the decedent's son, John C. Duncan, Jr., and his only grandson then living John C. Duncan, III, who were then, respectively, 29 and 3 years of age. During such

trust term the income was payable to the decedent so long as he was living, and after his death, to his said son so long as the latter was living, and after the death of both of them to the issue of the decedent's said son surviving from time to time, until they, respectively, attained the age of thirty-five years when their share of the principal would become distributable to them. In the event that no such issue attained the age of thirty-five years, the corpus was distributable to the decedent's brother and sister and their descendants.

However, the trust agreement provided that if the trust term ended while the decedent was still living, the *corpus* of the trust was to revert to him. Actually the decedent predeceased both his son and grandson.

The Commissioner included in the gross taxable estate of the decedent not only the remainder interests in the trust *corpus* which were subject to the reversionary interest in the decedent, but also included the life interests in the trust income which the decedent had transferred to his son and grandchildren and which were subject only to the life interest (as distinguished from the reversionary interest) which the decedent had reserved.

Argument.

The statute here involved (§302 of the Revenue Act of 1926, as amended; Internal Revenue Code, §811) in so far as material requires that in determining the gross taxable estate of a decedent, the following property be included:

> "(e) *To the extent of any interest therein** of which the decedent has at any time made a trans-

* Italics supplied throughout.

> fer by trust, or otherwise, * * * intended to take effect in possession or enjoyment at or after his death * * *."

The statute does *not* purport to require the inclusion in such gross estate, of the *whole* of a given piece of property in respect of which the decedent has made a transfer of "any interest therein" intended to take effect in possession or enjoyment at or after his death; but, on the contrary, by its very terms provides for the inclusion in such gross estate of *only* the particular interest which was thus transferred.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347, the Court said:

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of *the interest which is transferred.*"

In *Central National Bank of Cleveland* v. *U. S.*, 41 F. Supp. 239, 248, it was stated:

> "The Act, therefore, expressly says that there should be included in the gross estate *only that interest* which was intended to take effect in possession or enjoyment at or after death."

Therefore, in order to determine whether a particular interest is required to be included in the decedent's gross taxable estate, we must consider the character of the transfer which the decedent made of *that particular interest.*

Thus, for example:

(1) If prior to 1931, A makes a present irrevocable transfer in trust, reserving the income to himself for life and providing that at his death the principal shall go to B, the transfer of the said interest to B is not regarded as a transfer "intended to take effect in possession or enjoyment at or after death", and accordingly on A's death the said interest transferred to B is not included in A's gross taxable estate. This type of transfer is governed by *May* v. *Heiner*, 281 U. S. 238. Whether B's interest is an estate for life or in fee makes no difference. In either case such interest is not includible in A's gross taxable estate (*Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 784; and *Hassett* v. *Welch*, 303 U. S. 303). Naturally, if the interest transferred to B is only a life estate, then the reversion remains in A and is taxable on A's death the same as any other property which he then owns. However, the outstanding life interest in B is not so taxed because A absolutely divested himself of such interest during his life (*May* v. *Heiner*, *Burnet* v. *Northern Trust Co.*, *McCormick* v. *Burnet* and *Hassett* v. *Welch*, all *supra*). The mere possibility that owing to B's premature death his life interest might never take effect in actual possession or enjoyment, is immaterial. The ownership of it became absolutely vested in him when it was transferred. A's death can neither add nor detract from such ownership. It can merely "obliterate" A's life interest, whereupon B's would come into actual enjoyment.

(2) If, on the other hand, A makes a present irrevocable transfer in trust under which the income

goes to B for life and on B's death the principal reverts to A if then living, but otherwise goes to C, then, even though A predeceases B, the transfer of the said interest to C is in effect disregarded and, accordingly, such reversion or remainder is subjected to tax at A's death as if he actually owned it at that time. However, the transfer of the life interest to B is not so treated and thus is not included in determining A's gross taxable estate. This is *Helvering* v. *Hallock*, 309 U. S. 106; *Klein* v. *United States*, 283 U. S. 231.

It is true that in both types of transfer the interest transferred by A cannot take effect in actual possession or enjoyment until after his death. The only difference between them is that in one the interest transferred is subject to a preceding life estate in the decedent, and in the other the interest transferred is subject to a reversion in the decedent. But the question here is not whether the distinction between the two types of transfer is based upon sound logical grounds. That inquiry is no longer relevant, because the distinction is now made by statutory mandate, as regards trusts created prior to the Joint Resolution of March 3, 1931 (*Hassett* v. *Welch*, 303 U. S. 303).

Here we have a legislative history quite different from that considered in *Helvering* v. *Hallock*, *supra*. In the *Hallock* case the taxpayer was relying on mere inferences which he sought to draw from the *silence* of Congress in failing to amend the statute notwithstanding the decisions of this Court in *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39 and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48. Here we have *affirmative* evidence of the Congressional intention, as pointed

out by this Court in *Hassett* v. *Welch*, *supra*. Thus the statute in effect provides, as regards trusts created prior to the Joint Resolution of March 3, 1931, that *May* v. *Heiner* shall govern.

In *May* v. *Heiner* the decedent had created an irrevocable trust the income of which was payable to her husband for life, and after his death to herself for life; upon the death of the survivor the *corpus* became distributable to their children. The record did not disclose whether or not the decedent had survived her husband, but the Court specifically said that this was immaterial; in either case, the Court held, the transfer "was not testamentary in character". Thus the Court assumed for the purposes of the decision that the decedent, Mrs. May, had survived her husband; nevertheless, it held:

> "At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

Hence, the point decided in *May* v. *Heiner* was this: That the mere "falling in", that is to say, the taking effect in actual possession or enjoyment, of estates or interests upon the termination of a preceding life estate, does not constitute a transfer which is subjected to tax by the statute. This is true whether the decedent himself has reserved the preceding life interest, or whether he has transferred it to some one else, or whether some one else has created it in his favor; all three of these situations stand on precisely the same footing.

That such was the holding in *May* v. *Heiner* is made even clearer by an examination of the earlier case of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, upon which the decision in *May* v. *Heiner* was squarely based. Almost one-third of the opinion in *May* v. *Heiner* is devoted to the *Reinecke* case. Under one of the trusts involved in the *Reinecke* case the income was payable to a beneficiary other than the decedent, either until five years after the decedent's death, or until the death of such beneficiary if he survived the decedent, at which time the *corpus* became distributable. In rejecting the Government's contention that the transfer was one intended to take effect in possession or enjoyment at or after death, this Court said, at page 347:

> "But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen *after the testator's death*, as directed, and after the enactment of the statute, is included within its taxing provisions. * * *
>
> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life

estate in one with remainder over to another at or after the donor's death."

Thus the *Reinecke* case established that the mere passing of the actual possession or enjoyment of the property from the holder of a preceding life interest therein to the holder of the next succeeding interest, was not a transfer subjected to tax by the statute, even though the event which fixed the time of such passing was the decedent's death.

May v. *Heiner* extended this same principle to cases where the preceding life interest had been reserved by the decedent himself. Thus it held that when the estates or interests subject to such reserved life estate take effect in actual possession or enjoyment at the decedent's death, there is no taxable transfer—not any more so than if the preceding life estate had also been transferred absolutely by the decedent in his lifetime to some one else, or had been created for the decedent's benefit by some one other than himself.

By way of illustration, let us apply the foregoing to the facts in the *Stinson* case (*Fidelity-Philadelphia Trust Co.* v. *Rothensies* #263) which is being heard with the case at bar. There the decedent in 1928 created an irrevocable trust under which the income was payable to herself for life, and after her death, to her two daughters and the survivor of them during life. At most, all that the decedent reserved (in addition to her life estate) was the right to dispose of the *corpus* of the trust by her will, *but subject to the said life estates in favor of her daughters.* It will be noted that the transfer of the said life interests to the daughters was absolute. The Court

below recognized this in its opinion (142 F. (2d) 838), in which it stated, at page 841:

> "The rights of the beneficiaries *other than those of the grantor's daughters* could not become absolute until the death of the grantor * * *."

Nevertheless, the Government contends, and the Court below held (142 F. (2d) 838), that these life interests so transferred to the daughters must be included in decedent's gross taxable estate. Such a result, we submit, is plainly contrary to *May* v. *Heiner*.

The Government's main point seems to be that until the death of Mrs. Stinson it could not be known whether the life estates which she had given to her daughters would actually take effect in possession or enjoyment. But this same statement would also have been true, *mutatis mutandis*, in *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 784; *Morsman* v. *Burnet*, 283 U. S. 783; and *Hassett* v. *Welch*, 303 U. S. 303, in which *May* v. *Heiner*, *supra*, was applied.

In *Burnet* v. *Northern Trust Co.*, *supra*, the trust was to continue until the youngest of the surviving children of the decedent and the children of a stepdaughter attained the age of twenty-one years or until the death of all of the decedent's children and said stepdaughter, whichever should happen last, and during such trust term the income, after the death of the decedent, was payable to the decedent's children or their issue surviving from time to time; on the termination of the trust the principal was distributable to the decedent's issue and the issue of the said stepdaughter then living (Record on Appeal, pp. 8, 9, 16, 17).

In *McCormick* v. *Burnet*, *supra*, the income of the trust after the death of the decedent was payable to her children during their lives, and after their death the principal was distributable either as they appointed by will or to their then surviving issue (Record on Appeal, pp. 18, 19).

In *Morsman* v. *Burnet*, *supra*, the income of the trust after the decedent's death was payable to her sons so long as they were living during a period of two years after the decedent's death. On the termination of the trust the principal was distributable to the sons if living or if then dead to their then surviving issue (Record on Appeal, p. 16).

In *Hassett* v. *Welch*, *supra*, the income of the trust after the death of the decedent was payable to his nephews and nieces during their respective lives, and upon the termination of the trust the principal was payable to their then living issue (Record on Appeal, pp. 105-106).

Thus, in all of the cases the decedent (as the decedent in the *Stinson* case and in the case at bar) had created life estates in favor of other persons which were to take effect in possession or enjoyment after the decedent's death. Nevertheless, such life estates were held not to be includible in the gross taxable estate of the decedent.

It is no answer for the Government to say that in the *Stinson* case (as in the case at bar and our *Duncan* case) it could not be known until at or after the decedent's death whether any of the interests which he had transferred would actually take effect in possession or enjoyment. Assume that prior to 1931 the decedent had irrevocably conveyed to various persons successive legal life estates in real estate which he then owned, subject, however, to a reserved life estate in himself. Surely, in valuing the rever-

sion which remained in the decedent and passed upon his death, no one would contend that the said legal life estates owned by persons who were still living, should be disregarded. And yet in the hypothetical case it would also be true that it could not be known until at or after the decedent's death whether any of the interests transferred by the decedent during his lifetime would actually take effect in possession or enjoyment. Indeed, even in *May* v. *Heiner* and the above cited cases in which it was applied, there was certainly a *possibility* that none of the interests transfered by the decedent would take effect in actual possession or enjoyment. In practically all *inter vivos* trusts as ordinarily created, there is an inherent *possibility* of the property ultimately passing as part of the settlor's estate. It is submitted, therefore, that the transfer by Mrs. Stinson of the said interests in favor of her daughters is governed by *May* v. *Heiner* and the above cited cases in which it was applied.*

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* *Klein* v. *United States*, 283 U. S. 231 (upon which *Helvering* v. *Hallock* was based) was argued in this Court on the same day as *Burnet* v. *Northern Trust Co.*, *Morsman* v. *Burnet* and *McCormick* v. *Burnet*, all *supra*, which were based upon *May* v. *Heiner*. Obviously, this Court could not have regarded the decision in the *Burnet* cases as being in conflict with the decision in the *Klein* case. In the *Klein* case the transfer of the remainder was held taxable because such remainder was subject to a preceding reversion which the decedent had reserved. On the other hand, the life estate which the decedent had conveyed to the widow and which had precedence over the reversion was held not to be taxable. In the three *Burnet* cases the interests which the decedent had transferred were held not to be taxable because they were subject only to the life estate which the decedent had reserved, notwithstanding that until the decedent's death it could not be known which of these interests would actually vest in possession or enjoyment. Obviously, the Court regarded this latter circumstance as immaterial. Therefore, we submit that in respect of transfers made prior to 1931, the test for determining whether a transfer of a particular interest is taxable is whether such interest is merely subject to a preceding life estate reserved by the decedent or whether it is subject to a reversion so reserved.

The Treasury Regulations [Treas. Reg. 80, Art. 17 as amended by T. D. 5008, 1940, 2 C. B. 286, 287, printed in Appendix, Government's Brief] which were enacted in the light of the *Hallock* decision contain the following provision:

> "Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate and remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless *that* estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate."

We submit that under the very language of the above quoted Regulation the life estates of the Stinson daughters must be excluded in applying the *Hallock* decision. The term "outstanding", when used in connection with estates or interests in property, has a generally accepted meaning. It refers to those estates and interests the title or ownership of which is outstanding. Clearly, therefore, the life estates of the daughters were "outstanding" at the time of the decedent's death.

According to the construction of the said Regulation urged by the Government, it would logically follow that even if Mrs. Stinson, prior to 1931, had made an absolute transfer of her life estate to someone else,

nevertheless, on her death the life estates owned by the daughters could not be excluded in determining the taxable interests in Mrs. Stinson's estate. Such a result, we submit, would be absurd.

The foregoing also applies to the case at bar. Here the decedent, in effect, carved out of his property an estate *pur autre vie*, measured by the lives of his two nieces. The interests in this estate *pur autre vie*, he transferred absolutely and irrevocably by the trust which he created on June 8, 1922. These interests, it is true, were subject to the preceding life interest which the decedent reserved to himself, but this, as we have seen, did not render their transfer taxable, since such transfer is governed by *May* v. *Heiner*. The situation however is different as regards the remainder interests. These were subject to the reversionary interest which the decedent had reserved, and thus the transfer thereof was taxable under the *Hallock* case.*

If it is thought desirable to change *May* v. *Heiner*, we respectfully submit that the only way such change

* Referring to extract from the opinion of the New York Appellate Division, Second Department, in *Matter of Pratt*, 262 App. Div. 240, aff'd. without opinion 289 N. Y. 621, quoted in the footnote on page 11 of the Government's brief, we respectfully submit the following: (1) Certainly the grantor's reversionary interest was not an "impediment" to the taking effect of the life interests which had precedence over it. The only "impediment" to the taking effect of such life interests was the life interest which the grantor had reserved to himself. The obliteration of this particular "impediment" did not result in a taxable transfer (*May* v. *Heiner*, *supra*). (2) The Court says that "the remainder which then vested for the first time is the fund to be taxed." If so, the value of the remainder should be ascertained by deducting the outstanding life estates, and yet the Court held that "the full value of the trust fund at the date of the decedent's death" without deducting the value of the outstanding life interests, should be included in the taxable estate.

could be accomplished in a fair and equitable manner would be by congressional action. If this Court should partially overrule *May* v. *Heiner* (which is what the Government's contention really involves), it would lead to gross inequalities of taxation and to patently unfair results. This is clearly illustrated by the following three hypothetical cases:

(1) Prior to 1931, A creates an irrevocable *inter vivos* trust reserving to himself the entire income for life with remainders over. The estate tax payable at his death on this transfer would be zero (*Hassett* v. *Welch, supra*).

(2) Prior to 1931, A creates an irrevocable trust giving successive life estates to half a dozen persons but providing that if he should survive all of them, the corpus of the trust should revert to him. Result: a minimum part of the trust is subjected to tax in view of the deduction of the outstanding life estates under the *Hallock* case. Let us say, therefore, that one-fifth of the property is subjected to tax.

(3) But according to the Government's contention, if A in Case (2) merely reserves a life interest (which reserved interest results in no tax whatever under Case (1)), such reservation under Case (2) results in subjecting to tax the entire trust fund as distinguished from the portion thereof which is subjected to tax under Case (2).

Thus the Government's contention may be reduced to the following formula: 1 5th plus 0 = 5 5ths. In practical operation such a formula is bound to result in gross inequalities of taxation and manifest unfairness. Since the interest reserved by the decedent

in Case (3) is an interest the reservation of which results in no tax (Case (1)), it is difficult to see why the property subjected to tax should be any different in Case (3) from Case (2).

Our *Duncan* case also serves to illustrate the unfair practical results to which the Government's contention would lead. Mr. Duncan had inherited from his wife one-half of her estate and shortly after her death he decided to place this property in an irrevocable trust under which the income would be payable to himself for life, and after his death to his only son for life, and after the death of both of them to his grandchildren until they, respectively, attained the age of thirty-five years when their respective shares of the principal would become distributable to them. Mr. Duncan was averse to having the property distributed outright to the grandchildren before they had attained a mature age. If his plan could have been carried out in the precise *form* that he contemplated, no Federal estate tax concededly would have been payable on his death. However, because he was a resident of the State of New York and under the New York "Rule against Perpetuities" (N. Y. Personal Prop. Law §11; Real Prop. Law §42) a trust may not be created to last for longer than two lives in being at the time of its creation, his dispositive plan had to take a different *form*. Accordingly, the lives of his son and grandson who were then, respectively, twenty-nine and three years of age, were selected as the "measuring lives" for the trust. Thus the decedent's plan was fitted into the framework of the New York "Rule against Perpetuities". This, however, did not change his underlying intention. Naturally, although it was most unlikely that the

decedent who was then over sixty-five years of age would survive both his son and grandson who were twenty-nine and three years of age, respectively, this, nevertheless, was within the range of possibility and, therefore, in order to protect the decedent's life interest, it was necessary that he reserve a reversionary interest in the corpus of the trust in the event that the trust should end before his death.

Looking at the matter from a practical standpoint, however, the difference between the two plans was primarily one of form rather than of substance. In actual results there has been no difference at all.

Of course, it is entirely reasonable in such a case to subject to tax the remainder interests which the decedent made subordinate to his reversionary interest. But there is an obvious incongruity in making the complete exemption or complete taxability of the *entire* trust depend upon a relatively unimportant provision which in the normal course of events would never become effective.

Respectfully submitted,

CHARLES ANGULO,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 578.—October Term, 1944.

Commissioner of Internal Revenue, Petitioner, *vs.* Estate of Lester Field, Deceased, Barnett Hollander, Temporary Administrator and Executor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 5, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

This is a companion case to *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, No. 263, decided this day. It too presents a question as to the proper valuation of the corpus of an *inter vivos* trust under Section 302(c) of the Revenue Act of 1926, 44 Stat. 9, 70.

On June 8, 1922, the decedent transferred to a trustee certain assets valued at the date of his death at the sum of $157,452.82. The material portions of the trust provided:

1. The trust was to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under 4, *infra*.

2. The income was to be paid to the decedent for his life unless the trust terminated before his death.

3. If the decedent died prior to the termination of the trust leaving issue, the trust property was to be held in trust for the children or their issue, subject to decedent's right to reduce or cancel the amounts of the gifts by will or written instrument. Provisions were also made for a $150,000 trust for the widow which is not in issue in this case.

4. During the continuance of the trusts the income was to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus was to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving; if none, then to decedent's brother or sister or their issue.

5. Upon termination of the trust before the death of the decedent the corpus was to be paid over to decedent.

6. Upon termination of the trust after the death of the decedent but during the existence of any trust the corpus was to be paid to the life beneficiary.

The decedent at no time had any issue. At his death in 1937 at the age of 52, he was survived by the two nieces whose lives were to measure the maximum life of the trust. These nieces were then aged 18 and 25 respectively. He was also survived by his widow, a sister and issue of a deceased brother.

The Tax Court held that the entire amount of $157,452.82 was includable in the gross estate for purposes of the estate tax. 2 T. C. 21. But the court below reversed and remanded the case to the Tax Court with directions to include in the gross estate only $24,930.76—the value at the time of decedent's death of a remainder in the sum of $157,452.82 payable at all events upon the death of the survivor of two females, aged 18 and 25 respectively. 144 F. 2d 62.

The error of the court below is self-evident from our discussion in the *Fidelity-Philadelphia Trust Co.* case. The trust here was limited in duration to the lives of the decedent's two nieces. But if both nieces died before the decedent, the corpus would have been paid to the decedent rather than to the beneficiaries named in the trust instrument (in this instance the decedent's sister and the issue of his deceased brother). Thus until decedent's death it was uncertain whether any of the corpus would pass to the beneficiaries or whether it would revert to the decedent. Decedent retaining a string attached to all the property until death severed it, the entire corpus was swept into the gross estate and was taxable accordingly.

There is no basis evident for deducting the value of the corpus for the period of the life expectancies of the two measuring lives, as was done by the court below. The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

Reversed.

Mr. Justice DOUGLAS, concurring.

If the trust gave a life estate to the decedent and the remainder to his children, § 302(c) of the 1926 Act would not require the payment of a tax under the rule of *May* v. *Heiner*, 281 U. S. 238; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 784; and *Hassett* v. *Welch*, 303 U. S. 303. The theory of *May* v. *Heiner* was that under those circumstances no interest in the property passed from the grantor to the remainderman on the grantor's death, since the title of the remainderman had been definitely fixed by the trust deed. We need not determine whether the rule of *May* v. *Heiner* should survive *Helvering* v. *Hallock*, 309 U. S. 106. See Paul, Federal Estate & Gift Taxation (1942) § 7.15. For in this case the grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the corpus would have been returned to the grantor if he survived his nieces. Hence it seems plain that the gifts over would take effect in possession or enjoyment only at or after the death of the grantor.